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No. 07-335

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Supreme Court of the United States

SHELLY PARKER, TOM G. PALMER, GILLIAN ST. LAWRENCE, TRACEY AMBEAU, AND GEORGE LYON,
Cross-Petitioners,

v.

DISTRICT OF COLUMBIA AND MAYOR ADRIAN M. FENTY,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

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CROSS-RESPONDENTS' BRIEF IN OPPOSITION

The cross-petition presents a question on which this Court recently denied certiorari in identical circumstances. *See Seegars v. Ashcroft*, 396 F.3d 1248 (D.C. Cir. 2005), *cert. denied*, *Seegars v. Gonzales*, 546 U.S. 1157 (2006) (No. 05-365). Because cross-petitioners identify no reason why a different result should obtain in this case, the cross-petition should be denied.

1. Preliminarily, there is an issue regarding the Court's jurisdiction. The cross-petition relies on the petition in *District of Columbia v. Heller*, No. 07-290 (filed Sept. 4, 2007), but that petition was not filed against cross-petitioners and does not seek to change the court of appeals' judgment with respect to them. *See* Cert. Pet. ii. The cross-petition procedure (like a cross-appeal in the lower courts) exists in order to permit parties who may be drawn into an appellate proceeding to seek to expand a judgment in their favor. *See, e.g., Atkins v. Parker*, 472 U.S. 115, 123 (1985). The rare cases in which this Court has noted that it has granted conditional cross-petitions have thus been limited to circumstances where the cross-petitioners at least partially prevailed in the lower court. *See, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 464 (2001); *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 280 (1983); *Snepp v. United States*, 444 U.S. 507, 507 (1980).

In this case, by contrast, the judgment below was entirely adverse to cross-petitioners: the D.C. Circuit held that their claims must be dismissed because they lack standing. Petitioners District of Columbia and Mayor Adrian M. Fenty had no basis for seeking re-

view of that disposition, and thus did not seek certiorari against cross-petitioners. The proper course for cross-petitioners was to raise their standing arguments in a timely petition for certiorari, which they failed to do.

To be sure, Supreme Court Rule 12.5 allows "a respondent seeking to file a conditional cross-petition" to do so after the time for filing a petition has expired. That rule, however, is best understood to refer to a respondent whose legal interests conceivably could be put at issue in the initial petition, not to entitle *any* party who claims the status of respondent under Rule 12.6 to file what would otherwise be an untimely petition, even if there is no legal reason for the putative cross-petitioner to have waited to see if a petition for certiorari would be filed.

2. In any event, there is no reason to grant certiorari on the question presented by the cross-petition any more than there was in *Seegars*. In that case, all of the plaintiffs wanted to own handguns but none did, except one who kept the handgun he owned outside of the District. *Seegars*, 396 F.3d at 1250. One of the plaintiffs owned a shotgun, which she kept bound by a trigger lock, and which she alleged she would want to unlock if she felt endangered. *Id.* at 1251. The D.C. Circuit held that none of the plaintiffs had standing (*id.* at 1256), and the plaintiffs petitioned for certiorari.

Opposing certiorari, the Solicitor General explained that the D.C. Circuit's decision in *Seegars* and its prior decision in *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997), were consistent with this Court's cases on pre-enforcement standing, because risking a criminal prosecution was not "the sole [al-

ternative] means of seeking relief." Brief in Opposition at 10 ("BIO"), *Seegars v. Gonzalez* (No. 05-365) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (alteration in BIO). Petitioners there, like cross-petitioners here, could have applied to register their handguns and challenged any resulting denials. The Solicitor General further explained that the circuit conflict alleged in the petition did not exist (*id.* at 11), and that the fear of one petitioner who owned a lawfully registered shotgun that she would be prosecuted was too speculative to support standing if her only intention was to unlock her gun for use in self-defense. *Id.* at 13. This Court denied the petition. Because the circumstances under which standing was denied in this case are indistinguishable, certiorari should be denied here as well.

3. Cross-petitioners' claims of conflicts with decisions of this Court and other courts of appeals rest largely on a mischaracterization of the D.C. Circuit's standing jurisprudence. The court of appeals does not hold that a civil rights plaintiff lacks standing unless he first violates the law. This case is a perfect example. The D.C. Circuit held that respondent Dick Heller had standing although he had not violated any law. Instead, he applied for a gun permit, and it was denied. On that basis, the court of appeals found that he had standing to challenge not only the District's handgun ban, but also the ancillary requirements that those carrying handguns be licensed under D.C. Code § 22-4504(a) and that firearms be kept "unloaded and disassembled or bound by a trigger lock or similar device" under D.C. Code § 7-2507.02. Pet. App. 8a.

The D.C. Circuit's ruling thus recognizes the standing of a class of potential plaintiffs who have not violated the law yet have demonstrated a concrete inter-

est in the outcome of this litigation. That class of persons incurs no substantial burden; the application process is simple. *See* Pet. App. 120a (Heller's application). The court of appeals had no need to address whether, as a prudential matter, a broader class of persons would have standing to challenge the handgun ban and other restrictions on handgun possession and use if someone who, like Heller, unsuccessfully invoked the permit application process did not have standing.

Cross-petitioners themselves point out that the leading D.C. Circuit precedent concludes that it would be inappropriate to require plaintiffs to violate the law before recognizing their standing. Cross-Pet. 13 (citing *Navegar, Inc.*, 103 F.3d at 1000-01). There is no conflict between that admonition and the ruling in this case. If the D.C. Circuit in a later case applies its pre-enforcement standing jurisprudence to bar all pre-enforcement claims of a certain type, as cross-petitioners suggest is possible, review can be granted to consider that later ruling.

4. Properly understood, there is no conflict between the D.C. Circuit's ruling on standing and this Court's precedents. Cross-petitioners claim that the decision below cannot be reconciled with *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764 (2007), *Babbitt*, 442 U.S. 289, and *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988). But each of those cases arose in a different regulatory environment. As *Babbbit* itself noted, whether a plaintiff has standing or not cannot be discerned under any "precise test." *Babbitt*, 442 U.S. at 297; *cf. Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 n.29 (1974) ("maturity of [pre-enforcement] disputes for resolution before a prosecution begins is decided on a case-by-case basis,

by considering the likelihood that the complainant will disobey the law, the certainty that such disobedience will take a particular form, any present injury occasioned by the threat of prosecution, and the likelihood that a prosecution will actually ensue").

Nor is there a conflict between the court of appeals' standing holding and decisions of other circuits. Cross-petitioners point to the Sixth Circuit's decision in *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998) ("*PRO*"). Far more informative, however, is that court's holding that individuals in cross-petitioners' circumstances lack standing to bring a pre-enforcement challenge to a ban on a particular type of weapon. *See Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 293 (6th Cir. 1997) ("Plaintiffs' assertions that they 'wish' or 'intend' to engage in proscribed conduct is not sufficient to establish an injury-in-fact under Article III.").

PRO is distinguishable. The plaintiffs there were held to have standing because they–in contrast to the plaintiffs in *Magaw* and cross-petitioners here–owned guns and were faced with the choice of moving their guns outside of the city or suffering penalties because of a change in law. (One plaintiff was an organization with members in that position.) The fact that the plaintiffs owned guns that became unlawful was the critical factor in finding standing and was the reason the Sixth Circuit in *PRO* distinguished its earlier decision in *Magaw*. *See PRO*, 152 F.3d at 530. Contrary to what Heller states, there is no indication that any plaintiffs had standing on the basis that they "pos-

sess[ed] weapons outside of [the] jurisdiction." Cross-Pet. 12.[1]

5. Because respondent Heller was held to have standing, the cross-petitioners have little if anything to gain from their submission. Any judgment by this Court in No. 07-290 will bind the District as against all of its citizens, including cross-petitioners. Indeed, where one plaintiff has sufficient standing to bring the merits of a dispute within the courts' subject matter jurisdiction, this Court has on more than one occasion noted that it is unnecessary for it to consider whether other plaintiffs also have standing. *See Babbitt*, 442 U.S. at 299 n.11; *Buckley v. Valeo*, 424 U.S. 1, 12 (1976).

The D.C. Circuit ruled that Heller was entitled to injunctive relief against the District that is indistinguishable from the relief sought by the other cross-petitioners, with only the possible exception of Gillian St. Lawrence. Unlike Heller and the other cross-petitioners, she claims to have a lawfully registered weapon—a shotgun—in the District. Cross-Pet. App. 15. She "intends to use the gun if necessary in lawful self-defense within her home," but she fears "criminal penalties if she assembles and unlocks her shotgun at home under any circumstance" in supposed violation of D.C. Code § 7-2507.02. *Id.*; *see* Complaint at 3-4. The District agrees, however, that the D.C. Code does not prohibit her from using a lawful firearm in self-

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[1] Cross-petitioners' "see also" citation to *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999), is similarly unavailing. In that case, standing was granted to a plaintiff who was prohibited from carrying a gun under a federal statute, consequently lost his job as a police officer, and challenged the statute under the Second, Fifth, and Tenth Amendments.

defense. *See* Pet. for Cert. 7 n.2. She accordingly does not have a live case or controversy with the District.

Heller and cross-petitioners agree that this Court should grant the District's petition for certiorari. Cross-Pet. 9. Granting the cross-petition would unnecessarily complicate the pending litigation on the meaning of the Second Amendment. Indeed, given the D.C. Circuit's holding that Heller has standing, the District would have little interest in defending the decision of the court of appeals that cross-petitioners lacked standing even if the cross-petition were granted.

CONCLUSION

For these reasons, the cross-petition should be denied.

Respectfully submitted,

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